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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 653

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY,

Petitioner,

against

ANTOINETTE CONTINO AND MICHAEL A. CONTINO, TO THEIR OWN USE AND TO THE USE OF THE FIRE ASSOCIATION OF PHILADELPHIA,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

J. COOKMAN BOYD, JR.,
Davison Building,
Baltimore 1, Maryland,

J. RICHARD WILKINS,
931 N. Calvert St.,
Baltimore 2, Maryland,

Attorneys for Respondents.

The Daily Record Co., Baltimore 3, Md.

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RESPONDENTS' BRIEF

SUMMARY STATEMENT OF MATTER INVOLVED

This case involves only the application of the law of Maryland to a tort action instituted by the Respondents against the Petitioner in the United States District Court for the District of Maryland. After trial without a jury the District Court dismissed the complaint and entered judgment for the Petitioner (Defendant).

Respondents thereupon entered an appeal to the United States Court of Appeals for the Fourth Circuit which after full argument reversed the District Court. Petitioner did not file a motion for reargument nor did it apply to this

Court for Certiorari. It did file, unseasonably, a petition in the Court of Appeals praying an amendment to its mandate. After hearing this petition was denied.

Thereafter the District Court in conformity with the opinion and mandate of the Court of Appeals entered judgment for the Respondents (Plaintiff below). The Petitioner appealed therefrom to the United States Court of Appeals and the action of the District Court was affirmed.

The question involved on the latter appeal was whether the Court erred in refusing to permit Appellant (Petitioner here) to file an amended answer and offer further proof. The Court of Appeals affirmed that judgment.

The proposed amended answer raised no new defence. None of the purported defences set out therein were in the nature of affirmative defences which are required to be explicitly set out by Rule 8(c) of Rules of Civil Procedure but were fully open under the general denial of Petitioner in its original answer. The proffered testimony was likewise admissible under the original answer.

Petitioners were fully heard on their petition, in the District Court, to file said amended answer and on Respondents' motion for judgment in compliance with the order and mandate of the Court of Appeals. It is difficult to understand the claim that this action of the District Court was or could be considered the denial of due process of law. It is respectfully submitted that this action of the District Court was correct.

GROUND OF JURISDICTION

Respondents admit jurisdiction under 28 U. S. C. A. 1254 (1) in the sound discretion of this Court as to the judgment entered December 18, 1950 (Tr. 76-78).

Respondents deny such jurisdiction as to the judgment of December 23, 1949 (Tr. 44-50) as the time for consideration thereof has long since expired and it has become the law of the case.

Respondents further suggest that under Rule 38 (5) a, and b, of this Court this is not such a cause as would ordinarily be considered by this Honorable Court.

QUESTIONS PRESENTED

The only real question presented by the record is, did the trial Court err in denying petition of this Petitioner to file an amended answer and to offer the proffered testimony.

As the filing of amended pleadings after time is within the sound discretion of the Court and it is nowhere suggested that the Court abused that discretion there was and is no justification for consideration of that question.

THE HISTORY OF THE CASE

The Petitioner (Defendant below) operated and still operates a railroad in Maryland over a public highway by means of a bridge* built under an agreement by its predecessor railroad with the State Roads Commission of Maryland. This bridge was of insufficient height from the roadway for the safe use thereof by the travelling public, was unlighted, was insufficiently marked and there were no warning signs to give notice of this unsafe railroad crossing. At night Respondents, using this highway for the first time, came upon this bridge without any warning of its presence. Their trailer collided therewith and was completely demolished.

* Until the petitioner's brief on certiorari, the structure in question was referred to, and in fact is, a railroad bridge overpassing a state highway. It nowhere was referred to as a culvert, and in fact is not. No meritorious reason appears to support petitioner's sudden and complete change in its designation.

The District Court decided that the defendant (Petitioner here) owed no duty to the travelling public. The Court of Appeals found that under the law of Maryland Petitioner did owe a duty to the travelling public and that because of its neglect thereof it was liable to plaintiffs (Respondents here). Upon remand the District Court followed the opinion of the Court of Appeals and upon a further appeal by Petitioner the Court of Appeals decided that the action of the District Court was in accordance with its mandate.

There was and is nothing ambiguous or indefinite in the language of the Court of Appeals in either of its decisions in merely following the law of Maryland.

THE RIGHT OF THE DEFENDANT TO HAVE A NEW TRIAL

The defendant would have no right to a new trial as to a matter decided by the Court of Appeals or any matter which could have been raised under the pleadings and facts.

There was no matter undecided by the Court of Appeals and as pointed out the defense urged here was as fully presentable at the first trial below and upon the first appeal as if the proposed answer and proof had been before the Court at those times.

In considering a similar situation the Court of Appeals for the 8th Circuit said:

> "True, the point that this purchase was the consideration for this contract was not on the former trial below or on the hearing in this court then stressed with the vehemence now here present. But it was in the case. If it was not then so prominently put forward as to attract the attention of this court and demand specific treatment, those things do not detract one iota of vigor from the law of the case rule, for, if

this court had overlooked the potency of the point, in the opinion filed the matter should have been called to its attention by a motion for a rehearing."

Claiborne Reno Co. v. E. I. Dupont Co., 77 Fed. 2nd 565.

To the same effect is a strong opinion also in the 8th Circuit.

Thornton v. Carter, 109 Fed. 2nd 316.

The court there said at p. 320:

"A mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or *impliedly* disposed of on appeal. Since, however, a final judgment upon the merits concludes the parties as to all issues which were *or could have been decided* it is obvious that such a judgment of this court on appeal puts all such issues out of reach of the trial court on the remand of the case. That court is without power to do anything which is contrary to either the letter *or the spirit* of the mandate construed in the light of the opinion of this court deciding the case. If a judgment or decree of this court which disposes of a case upon the merits has become final, no purpose can be served by considering whether it is right or wrong. A judgment which is wrong, but unreversed, is as effective as a judgment which is right.

After a case has been brought to this court and decided and a mandate has been issued to the court below, a second appeal brings up nothing for revision but the proceedings subsequent to the mandate; and 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.' U. S. v. Cannon, 184 U. S. 572." (Italics added).

The Respondents urged, in answer to Petition to amend the mandate before the Court of Appeals and before the District Court on petition to file an amended answer:

> "Third. That the issue attempted to be raised by said petition was before this court having been covered in two aspects in appellants brief p. 8 and p. 10. It was not argued in appellees brief nor by it orally and under Rule 10 (8) of this court is deemed abandoned" (Tr. p. 59).

Rule 10 (8) of the United States Court of Appeals for the Fourth Circuit reads:

> "Points not argued in the briefs will be deemed abandoned and may not be argued orally except by permission of the court. The court, however, in the interest of justice, may notice plain error apparent in the record, whether or not it has been argued in the briefs or made the subject of objection or exception in the court below."

Thus it conclusively appears that the law of the case was established by the Court of Appeals by its decision of December 23rd, 1949.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT

As heretofore pointed out there was no reason for a new trial in this non-jury case, as the law had been established and there was no new issue of fact presented that was not presentable or inherent in the record at the first trial.

The three cases cited by Petitioner on p. 10 of its brief are not in point.

In the Helis case the right to a new trial was denied and after discussing the legal aspect of the record the court said:

> "Due process of law is not concerned with mere afterthought."

The cases cited by Petitioner on p. 14 of its brief are not analogous to the present case.

The Miller case involved reversal of a judgment for the plaintiff on a policy of insurance which the appellate court held did not cover the loss proved. Upon remand the suit was amended to include other provisions of the policy under which the plaintiff was clearly entitled to recover, if the proof were sufficient.

In the Jones case suit had been filed against the insurance company which had defended on the ground that because of breach of warranty the policy had never taken effect and in accordance with provisions thereof tendered return of the premiums paid. Judgment was entered against the company on the policy and on appeal the only question was liability of the company *vel non* on the policy for the loss. The appellate court found the policy not in force and reversed. Plaintiff then sought to amend so as to allow recovery of the premiums and over objection this was allowed. On appeal the second time in affirming action of the lower court the court said:

> "* * * The parties were free on such a reversal to introduce other evidence and present by amendment *new issues,* if not inconsistent with what the appellate court had adjudged. We had adjudged nothing about the premiums. * * *" (Italics added).

The Feldman case involved a motion after appeal to file an amended answer supported by affidavit alleging newly discovered evidence.

It is urged by Respondents, that a successor railroad is liable for the safety of its crossing of public highways so long as it exercises the franchise.

This is amply covered by the two cases following:

P. W. & B. R. R. v. State, 20 Md. 157;
Whitby v. Balto. C. & A. Ry., 96 Md. 700.

In the Whitby case, it was said:

> "* * * The obligation to keep up the crossing, imposed as a condition of the right to cross, necessarily attaches to whatever person or corporation may become the owner of the road, so long as the right is exercised. It is a continuing condition or obligation inseparable from the enjoyment of the franchise * * *."

This proposition has further support in other states.

Wasmer v. Del., Lac. & W. R. R., 80 N. Y. 212;
Little Miami R. R. v. County Commrs., 31 Ohio S. 338;
People of Bloomington v. C. & A. R. R., 67 Ill. 118.

Where one erects on his land a public nuisance his successor in title is liable for damages occasioned thereby if he uses the said nuisance.

Knoechel v. Inzirillo, 16 N. Y. S. 2nd 681 at p. 683 [11-14].

In Walters v. Wicomico County, 35 Md. 385, the court said:

> "It is said in the brief of the appellant, if one in possession erect a nuisance, his successor is not liable, unless his conduct amounts to a continuance, and if no act of continuance be shown, there must be notice to remove, and neglect or refusal to remove, before action. We entirely concur in this statement of the law, and think it fully sustained by the authorities. Before an action can be maintained against a party who has not erected the nuisance, it must be established that he either failed, *after request*, to remove it, or has done some act to continue it."

Here there can be no question of the continuance of the nuisance by the Petitioner as the record abounds with admissions that it has continuously used the bridge for railroad purposes and still so uses it as did its predecessors, in the same illegal manner.

The law of Maryland as above set forth is succinctly stated by the Court of Appeals in its second opinion in this cause as follows:

> "* * * We know of no authority for the proposition that a railroad corporation may escape liability for a dangerous condition existing on its line by showing that the condition was initiated by the preceding owner. Liability springs from the acceptance of the situation and the continued operation by the new owner in spite of the obvious danger. No duty rested upon it to purchase and operate the property if safe operation was impossible. Moreover, in the present instance there is no showing that the overpass could not have been conspicuously marked and lighted so as to be visible to the travelling public without offending the Maryland statute. Indeed it was conceded in argument in this court that it lay within the power of the railroad to place a light on its right of way at the crossing and its failure to do so is sufficient basis for an affirmance of the judgment. * * *"

CONCLUSION

It is manifest from the record that the law of this case was established by the decision of the Court of Appeals in Case No. 5977 filed December 23rd, 1949 and that no review of that decision is proper because of the lapse of the 90 day period; that the further proceedings in the District Court were in accordance with that mandate; and the action of the District Court on Petition for leave to file an amended answer was within its sound discretion which has not been challenged. But in all events, under the

law of Maryland the proposed amended answer did not set forth a good defence. Therefore it is submitted that the judgment was proper and the Respondents assert that certiorari in this case should be denied.

Respectfully,

J. Cookman Boyd, Jr.,
Davison Building,
Baltimore 1, Maryland,

J. Richard Wilkins,
931 N. Calvert St.,
Baltimore 2, Maryland,

Attorneys for Respondents.

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